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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MICHAEL BALTAZAR, Defendant and Appellant.	C060776 (Super.Ct.No. 08F01104)

After repeatedly victimizing his 78-year-old grandfather and others, defendant Ruben Michael Baltazar was convicted of three felonies (two first degree burglaries and a vehicle theft) and four misdemeanors (two thefts from an elder or dependent adult and two violations of a court order restraining defendant from being within 100 yards from his grandfather or his grandfather's home). The jury found defendant not guilty of other theft related offenses against his grandfather. Defendant was sentenced to four years in prison (concurrent middle terms of four years for the burglaries,

with a concurrent middle term of two years for the vehicle theft) and time served (294 days in county jail) for the misdemeanors.

On appeal, defendant challenges the sufficiency of the evidence to support his convictions for first degree burglary and theft, and raises a variety of other claims of error. We shall modify the judgment to stay execution of sentence on three of the misdemeanor convictions and to specify that defendant is entitled to additional presentence custody and conduct credits. Otherwise, we shall affirm the judgment.

FACTS

In March 2007, defendant's 78-year-old grandfather Neil Shelton obtained a restraining order prohibiting defendant from coming within 100 yards of Shelton or Shelton's residence. The restraining order was prompted by defendant putting his fist through a wall and a door at Shelton's residence. Despite the restraining order, defendant continued to come to the residence without Shelton's permission. Consequently, defendant was convicted of violating the restraining order on three separate occasions prior to the events that led to the convictions at issue in this appeal.

In January 2008, defendant entered Shelton's home in violation of the restraining order, went into Shelton's bedroom, and took one of Shelton's credit cards. When Shelton accused him of stealing the credit card and threatened to call the police, defendant retrieved the card and gave it back to Shelton. (These facts were the bases of defendant's convictions for burglary (count one), theft from an elder (count two), and disobeying a court order (count three).)

Shortly thereafter, Shelton called the police, reported the credit card incident, and also accused defendant of stealing Shelton's razor and lawnmower.

A number of lawnmowers, a rototiller, and a Weed Eater had been stolen from Shelton. After the first lawnmower was taken from his garage, Shelton confronted defendant, who denied taking it. Shelton then bought another lawnmower and chained and padlocked it to the base of his satellite dish in the back yard. A few days later, this lawnmower was also stolen. Shelton believed that defendant was the culprit. Each of the lawnmowers was valued at roughly $400. Shortly after the second lawnmower was stolen, a rototiller also disappeared. A Weed Eater was stolen about the same time as the other thefts.

In February 2008, Shelton awoke to a loud banging noise coming from his kitchen and found defendant there eating some of Shelton's food. Defendant had gained entry by breaking the top hinge of the security door that fortified the garage against entry from the back yard. When Shelton threatened to call the police, defendant left. (These facts were the bases of defendant's convictions for burglary (count four) and disobeying a court order (count seven).)

After the kitchen incident, defendant continued to come to the home in violation of the restraining order. Each time, Shelton would tell defendant he was not allowed to be there; but each time, defendant said that his grandmother, Violet Shelton, had let him in. Violet confirmed that she often allowed defendant to come into the house, notwithstanding her husband's objection. However,

Violet testified that not even she would have allowed defendant to break into the house in the middle of the night.

More items of Shelton's property disappeared during this time period, specifically, two or three electric razors and an electric hand mixer. Defendant's mother, Michelle Baltazar, who was living at the Shelton home, returned one of Shelton's razors.

In March 2008, a blue Ford F-150 truck was stolen from in front of the Shelton home. The truck belonged to Joseph Stanley, Violet's 73-year-old brother, who lived at the Shelton house. When Stanley noticed the truck was missing, he immediately called the police. Later that day, Herlinda Bastio, the 67-year-old grandmother of defendant's girlfriend, Tiffany Dougherty, called the Shelton house and complained that defendant was "bothering" Bastio and Dougherty at their apartment. When Bastio had asked defendant to leave, he told her to "fuck off." He then stood in the parking lot in front of a blue truck, professed his love for Dougherty, yelled for her to "come to the window," and said he had a "new car." In response to Bastio's phone call, Stanley went to Bastio's apartment complex and found the stolen F-150 in the parking lot. The truck had some damage to the passenger side door; the tool box in the truck bed had been broken into and several tools had been taken. The truck's license plates had been replaced with other plates, and the steering wheel's locking device had been damaged. Defendant did not have permission to take or drive the truck. (These facts were the bases of defendant's conviction for vehicle theft (count eight).)

Bastio had been the victim of a theft at the hands of defendant in 2007. After defendant arrived at her apartment while she was recuperating from an injury, Bastio went into her bedroom, leaving defendant alone in the living room. When Bastio returned to the living room ten minutes later, defendant was gone. Bastio's purse, which was in the living room, had been opened and $36 in cash and her ATM card were removed from her wallet. (These facts were the bases of defendant's conviction for theft from an elder (count nine).)

Neither Shelton, nor any other witness, saw defendant take any of the aforementioned items. Defendant did, however, return Shelton's credit card after defendant was confronted and accused of taking it. Defendant also admitted to his grandmother that he had taken one of the lawnmowers and sold it. And defendant's mother returned one of Shelton's razors after defendant was accused of stealing it.

In a recorded phone conversation between defendant and his mother while defendant was in jail, defendant told her to "wipe down all the fingerprints on the back door" and "screw the back screen door up, because the investigators are gonna probably fingerprint it." When his mother informed him that the door had already been returned to its hinges, defendant said: "Then go out to [Stanley's] truck and wipe all the fingerprints on -- on the truck and everything." Defendant also called Dougherty from jail and said he had been trying to contact her so she could flatten her grandmother's tires and his "old and retarded" grandfather's tires so they would not be able to come to court. Defendant admitted having a key to Stanley's truck that he kept in his bag, and asked

if Dougherty knew where it was. In another recorded conversation, defendant's grandmother told him she would be testifying that the reason defendant took the lawnmower was to cut one of his friend's lawns and that he brought it back when he was done. Instead, she testified she did not see defendant take a lawnmower, did not know he had taken one, and did not remember telling him she would come into court and testify that he had used the lawnmower to mow lawns.

DISCUSSION

I

Defendant contends there is insufficient evidence to support his convictions for first degree burglary. (Pen. Code, §§ 459, 460, subd. (a); further section references are to the Penal Code unless otherwise specified.) Not so.

The first burglary conviction was based on defendant's entry into Shelton's home and bedroom with the intent to steal Shelton's credit card. The second burglary conviction was for defendant's late night forcible entry into the Shelton home through the garage's security door with the intent to take and eat food.

Every person who enters an inhabited dwelling house, including any room that is functionally interconnected with and immediately contiguous to such a house, with the specific intent to take and carry away the personal property of another, of any value, and with the further specific intent to deprive the owner permanently of that property, is guilty of first degree burglary. (§§ 459, 460, subd. (a); *People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1107.)

Defendant does not dispute the Shelton home was an inhabited dwelling house, thus supporting charges of first degree burglary.

And with respect to the burglary charged in count one, defendant does not dispute that the evidence was sufficient to establish that defendant entered Shelton's home and stole his credit card with the intent to permanently deprive him of the card. He claims, however, that "the prosecution failed to prove a union of act and intent at the time of entry," namely that "at the very moment of entering the [home, defendant had] an intent to commit theft or some felony[.]"

In defendant's view, the evidence shows nothing more than that he "was living off and on in the Shelton home in violation of the restraining order but with the permission of Mr. Shelton's wife," and that he could have formed the intent to steal after having entered the home. Defendant even goes so far as to claim that the burglary conviction cannot stand because he was "not an intruder"--rather, he was "a common fixture in the Shelton home" as "the invited guest of his grandmother, albeit in violation of [the] restraining order"--such that he could not be convicted of "burglarizing his own home."

Defendant's fanciful interpretation of the evidence runs afoul of the standard of appellate review by ignoring credible evidence favorable to the prosecution, from which a rational jury could find defendant guilty of burglary beyond a reasonable doubt. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.)

By no stretch of the imagination does the evidence suggest the Shelton home was defendant's home. The restraining order that prohibited defendant from coming within 100 yards of the Shelton home dispels any far-fetched notion that defendant was akin to a resident of the home. That Violet indulged her grandson by allowing him to visit the house occasionally, in violation of the restraining

order, does not insulate defendant from liability for burglary if he entered the residence with the intent to steal. (*People v. Superior Court* (*Granillo*) (1988) 205 Cal.App.3d 1478, 1484 [consent to enter, given unaware of defendant's intent to commit larceny or any felony once inside, is a nullity]; *People v. Gauze* (1975) 15 Cal.3d 709, 713 ["'a party who enters with the intention to commit a felony enters without an invitation'"].)

As to the union of act and intent, there was substantial circumstantial evidence that, whenever defendant would arrive at the Shelton home, he did so not to exchange pleasantries; he came there to steal. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245 ["Because intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence. [Citations.] Whether the entry was accompanied by the requisite intent is a question of fact for the jury. [Citation.] 'Where the facts and circumstances of a particular case and the conduct of the defendant reasonably indicate his purpose in entering the premises is to commit larceny or any felony, the conviction may not be disturbed on appeal.' [Citation.]"].)

Accordingly, the jury reasonably could conclude that, when defendant entered Shelton's house, he did so with the intent to steal, as reflected by his theft of the credit card from Shelton's bedroom.

With respect to the burglary charged in count four, defendant does not dispute that he broke into the Shelton house in the middle of the night and, once inside, he ate food he found there. Yet, he claims the prosecution failed to prove "the eating was anything

more than an afterthought." In defendant's view, it "appeared equally likely that [he] entered the home for shelter," not to steal. The contention fails because the jury reasonably inferred that, when defendant broke into the house in the middle of the night, he did so not for a social visit or shelter, but to steal whatever he could get away with.

Unconvincing is defendant's argument that the prosecution "failed to prove [defendant] actually stole anything on the night [he broke into Shelton's home and ate his food]." Defendant first asserts his grandmother had "generally welcomed [him] into the home"; he then suggests that she gave him permission to eat the food there. The argument ignores his grandmother's testimony that, even though she had allowed him to enter the home on other occasions, despite the restraining order, she never would have let him to break into the house "and eat the food in the middle of the night." Next, defendant claims "no evidence was presented that Mr. Shelton even purchased the food. Given the number of persons living in the Shelton home, the food could have been anyone's food." This argument ignores the obvious; because ample evidence establishes that defendant entered the residence with the intent to steal, it matters not who owned the property (on this occasion, food) he took with the intent to permanently deprive the owner of the property (by eating it). In any event, Shelton testified the food belonged to him (when asked if he knew the food was his, even though he did not know whether defendant took it from the cupboard or the refrigerator, Shelton answered, "Yes, yes -- yes").

Contrary to defendant's claim, his convictions for burglary do not "lead to an absurd result beyond what the burglary statute seeks to protect." The "burglary law is designed to protect a possessory right in property against intrusion and the risk of harm" engendered by that intrusion. (*People v. Superior Court* (*Granillo*), *supra*, 205 Cal.App.3d at p. 1485; *People v. Gauze*, *supra*, 15 Cal.3d at pp. 713-715.) Here, defendant twice entered the Shelton home with the intent to steal, and in fact did steal property. On one occasion, he broke through a locked security door in the middle of the night. We reject categorically defendant's claim that "[n]o danger to personal safety arose from [such an] entry." And the fact that only food was taken in the second burglary is immaterial. A forcible entry into a home at night for the purpose of stealing anything is a serious crime which creates a significant risk of harm that the inhabitants will be hurt while trying to prevent the theft. Besides, the evidence suggested defendant's appetite for theft would have gone beyond just the food if he had not been discovered in the kitchen.

II

We also reject defendant's contention that the evidence did not support his conviction for theft, as alleged in count two.

The contention is premised on (1) the assumption that the theft conviction may have been based on the theft of Shelton's razors or lawnmowers, and (2) defendant's view there is no credible evidence that he is the person who took those items.

However, defendant's appellate counsel commendably acknowledges that the prosecutor inadvertently misspoke during closing argument when connecting the razor and lawnmowers to the charge in count two.

As counsel points out, the charging document tied count two to the burglary charged in count one; only a credit card was taken in that burglary; and theft of razors and lawnmowers "were the topics of" counts five and six, of which defendant was acquitted. The People add that because the jury found, as to count two, that the property taken by defendant had a value of $400 or less, the jury necessarily based that count on the theft of the credit card, since the collective value of the lawnmowers and razor exceeded $400.

We agree with the parties that the conviction on count two was based on defendant's credit card. Defendant says that, if we agree with him that "count two concerned the credit card," his substantial evidence challenge to his count two conviction "may be ignored." We interpret this as concession that the evidence supports a finding that defendant stole the credit card from Shelton's room. It does; thus, we move on to another claim of error.

III

Defendant contends his constitutional rights were violated when the court excluded proffered evidence that "several other thieves lived in the house at the time of the thefts and could have just as easily stolen the items." In his view, the evidence was admissible because it would have supported a third party culpability defense. Defendant is mistaken.

To be admissible under Evidence Code section 1101, evidence suggesting that a third party committed the crime alleged against a defendant must be more than simply that a third party had a "motive or opportunity to commit the crime"; this is so because, "without more, [such evidence] will not suffice to raise a reasonable doubt

about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833 (hereafter *Hall*); *People v. Farmer* (1989) 47 Cal.3d 888, 921, disapproved on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

Here, defendant submitted offers of proof that persons living in the Shelton home at the time of the thefts alleged against him were accused of stealing other items from Shelton while defendant was in custody. Specifically, he offered to prove that his mother, Michelle Baltazar, had taken Stanley's car without permission; that she had taken checks and credit cards from Shelton; and that her boyfriend had also been accused of theft. Defendant also offered to prove that Mark Shelton and two of his girlfriends had been accused of theft; that $800 was taken from the Shelton residence by an unidentified thief while defendant was in custody and while Tiffany Dougherty lived at the residence; and that Dougherty and her grandmother, Herlinda Bastio, engaged in check forgery while defendant was in custody.

The court excluded the proffered evidence because "[e]vidence of a third party's prior misconduct, simply to prove that he or she has a propensity to engage in the kind of activity that relates to the charged crimes . . . and is therefore more likely to have committed the [crimes] is not admissible." As the trial court correctly explained, "[t]he law requires direct or circumstantial evidence linking the third person to the actual perpetration of [these] particular crime[s]" and "[t]he mere fact that they all

lived in the same house and that they have a history of thefts is not necessarily enough."

We agree with the trial court that the proffered evidence was inadmissible because it would show nothing more than a third party's motive or opportunity to steal from Shelton, and did not constitute circumstantial evidence that would link any of the third parties to the thefts charged against defendant.

Defendant disagrees, suggesting the circumstances here are like those in *Hall*, a case holding it was error to exclude third party culpability evidence under the circumstances of that case. (*Hall, supra,* 41 Cal.3d at p. 833.) In *Hall*, the accused submitted offers of proof "linking [third party] Foust to the actual murder: waffle-stomper prints in the victim's bedroom [consistent with the kind of shoes worn by Foust], the likely left-handedness of the killer [Foust was left-handed], and [Foust's] knowledge of unique particulars of the murder all [of which] pointed to Foust as the possible killer." (*Ibid.*)

No such evidence was offered in this case. Defendant simply offered to show that third parties with an opportunity to commit the thefts from Shelton had a history of theft-related conduct. As the California Supreme Court has emphasized, such propensity evidence, even coupled with opportunity to commit the crimes charged against the defendant, is properly excluded because it is insufficient to link the third person to the actual perpetration of the crimes and, thus, is insufficient to raise a reasonable doubt as to defendant's guilt. (*People v. Davis* (1995) 10 Cal.4th 463, 501.)

In any event, besides concluding the proffered evidence did not satisfy the standard required for admissibility as third party culpability evidence, the trial court exercised its discretion to exclude the evidence pursuant to Evidence Code section 352, which states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Specifically, the trial court observed that, not only did the proffered evidence lack probative value because it was insufficient to link third parties to crimes charged against defendant, it also would create an undue consumption of time by requiring "five or six different mini trials" in order to bring out each instance of theft that was allegedly committed by the various individuals.

The trial court's ruling excluding the proffered third party culpability evidence pursuant to Evidence Code section 352 because of its minimal probative value and the undue consumption of time it would require was eminently reasonable and did not constitute an abuse of discretion.

IV

Also lacking in merit is defendant's claim that the court violated his constitutional right of confrontation by excluding evidence that the victim, Neil Shelton, was convicted of welfare fraud roughly 26 years before the trial.

"Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal

proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352." (*People v. Harris* (2005) 37 Cal.4th 310, 337; Evid. Code, § 788; Cal. Const., art. I, § 28, subd. (f), as interpreted by *People v. Castro* (1985) 38 Cal.3d 301, 317.)

When the witness subject to impeachment is not the defendant, the factors a court must consider in exercising its discretion under Evidence Code section 352 "prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) An exercise of discretion under this provision will be disturbed on appeal only if the trial court exercised it in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

Defendant correctly points out that Shelton's welfare fraud conviction can reflect adversely on his credibility. (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1685.) However, the trial court found that the 26-year-old conviction had little probative value because it was "very, very, very old."

The remoteness of the prior conviction is "a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.'"

(*People v. Beagle* (1972) 6 Cal.3d 441, 453;[1] see also *People v. Tamborrino* (1989) 215 Cal.App.3d 575, 590.)

Such was the situation here. Shelton's conviction for welfare fraud was very remote, and there was no evidence to show that he had not thereafter led a legally blameless life. Hence, the court did not abuse its discretion in excluding it pursuant to Evidence Code section 352.

Defendant's claim that the ruling violated his Sixth Amendment right of confrontation fails because "[t]he confrontation clause 'guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 229, quoting *Delaware v. Fensterer* (1985) 474 U.S. 15, 20 [88 L.Ed.2d 15, 19].) The clause does not preclude a trial court from imposing "reasonable limits" on cross-examination based on "concerns about, among other things," proffered evidence that is "only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 683].)

Defendant's further assertion -- the trial court violated his right of confrontation by excluding evidence that someone else stole Violet's jewelry -- is likewise without merit. When Shelton was asked about property that disappeared after defendant was discovered

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[1] *People v. Beagle, supra,* 6 Cal.3d 441, was superseded by constitutional amendment (Cal. Const., art. I, § 28, subd. (f)) but, as noted in *People v. Collins* (1986) 42 Cal.3d 378, at page 391, its discussion of the relevant factors that a court should consider in determining whether to exclude evidence of a prior conviction under Evidence Code section 352 remains good law.

in his kitchen, he stated his wife's jewelry was missing. Defendant objected, and this testimony was stricken from the record. It was not error, constitutional or otherwise, for the court to preclude defendant from putting on evidence to refute a statement that was stricken from the record. The jury was instructed not to consider the statement about the jewelry, and we presume the jury followed this instruction. (See, e.g., *People v. Ledesma* (2006) 39 Cal.4th 641, 684.)

Defendant also complains the trial court prevented him "from presenting evidence that[,] at the preliminary hearing[, Shelton] accused Michelle Baltazar of the credit card theft." He is wrong. The court disallowed inquiry into other instances of theft from Shelton for the sole purpose of demonstrating that third persons in the house were thieves and, thus, were more likely to have taken the items defendant was accused of taking. However, the court told defense counsel that, if Shelton had "accused someone other than [defendant] of taking [the] credit card . . . , you can certainly bring that up."

V

We disagree with defendant's assertion that the trial court erred in allowing the prosecution to introduce (1) evidence of the reason why the restraining order was issued prohibiting him from being within 100 yards of Shelton or Shelton's residence, and (2) Shelton's testimony about his earlier relationship with defendant and Shelton's continuing love for defendant, his grandson, despite the restraining order.

In defendant's view, both pieces of evidence were irrelevant and also prejudicial because they (1) "made [defendant] appear to be a violent predator when no crimes of violence were charged," and (2) "paint[ed]" Shelton as a "nice old m[a]n who had been victimized by [defendant]." We are not persuaded.

Defendant was charged with violating a restraining order that prohibited him from being within 100 yards of his grandfather or his grandfather's residence. The reason for the restraining order was the type of "background information" that, unless too prejudicial, is admissible "to help [the jurors] understand the circumstances surrounding [the alleged crime]" (*People v. Edwards* (1991) 54 Cal.3d 787, 818); otherwise, the jurors might have been tempted to speculate why a grandfather would take the highly unusual step of restraining a grandson from being near the grandfather or his home. For example, jurors might have wondered if defendant had beaten up his grandfather (physical assault or threats of assault being the usual reason for a restraining order), had otherwise harassed him in his home, or was ordered to stay away from him because defendant had repeatedly stolen from his grandfather. The brief testimony that the restraining order was due only to defendant having punched a hole in the wall and door at his grandfather's home is not so prejudicial to have required the court to exclude it. Indeed, the background information was far less prejudicial to defendant than possible speculation by jurors if they had not heard the reason for the restraining order.

Also admissible was the grandfather's testimony summarized by defendant as follows: "Mr. Shelton was allowed to describe his relationship with [defendant] when [he] was six or seven[ ]years[ ]

old"; [Shelton's] caring for [him] in his teenage years, Christmases together, and summer trips to Water World"; and Shelton's "professed love [for defendant despite the restraining order]." This evidence was "relevant to the credibility of a witness," Shelton, because it logically tended to establish that he had no motive or bias to lie about defendant's conduct. (Evid. Code, §§ 210, 785.)

VI

Since we have rejected defendant's claims of evidentiary error, there is no basis for his assertion that the rulings had "cumulatively prejudicial effect."

VII

Next, we dispose of defendant's contention that the trial court erred by denying his motion for a new trial based on "newly discovered evidence," namely that Shelton's son, Mark, was arrested for theft of Shelton's ATM card while defendant was incarcerated.

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328; *People v. Beeler* (1995) 9 Cal.4th 953, 1004.)

"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not

be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*People v. Delgado*, *supra*, 5 Cal.4th at p. 328; *People v. McDaniel* (1976) 16 Cal.3d 156, 179 ["A motion for a new trial on newly discovered evidence is looked upon with disfavor, and unless a clear abuse of discretion is shown, a denial of the motion will not be interfered with on appeal"].)

Here, defendant moved for a new trial on the basis of the same sort of evidence that he erroneously claims supports a third party culpability defense, i.e., Shelton's son, Mark, who was living in the Shelton home at the time of the thefts alleged against defendant, was accused of stealing Shelton's ATM card, while defendant was in custody.

As explained in part III, *ante*, such evidence would not be admissible because it does not directly or circumstantially connect Mark Shelton to the commission of specific thefts alleged against defendant. Inadmissible evidence cannot form the basis for a new trial motion. (*People v. Steele* (1989) 210 Cal.App.3d 67, 74.)

Defendant's reliance on *People v. Randle* (1982) 130 Cal.App.3d 286 is misplaced because that case involved the erroneous denial of a new trial motion after a conviction of forcible oral copulation, despite the fact that the defendant proffered newly discovered *admissible* evidence casting serious doubt on the veracity of the complaining witness, where her credibility was "central to the proof of the crime." (*Id.* at p. 293 ["The exclusion of the evidence bearing on the credibility of a prosecution witness where only the witness and defendant are percipient witnesses has been held to be prejudicial error"].) Here, defendant proffered evidence that would

be *inadmissible* and, therefore, could not render a different result probable on retrial.

VIII

We do agree with defendant in two respects.

First, defendant asserts that the burglary alleged in count one, misdemeanor theft alleged in count two, and misdemeanor disobedience of a court order alleged in count three were part of "an indivisible transaction with one objective, theft," as were the burglary alleged in count four and misdemeanor disobedience of a court order alleged in count seven. Thus, he argues, the trial court should have stayed execution of sentence on the three misdemeanors (counts two, three, and seven), pursuant to section 654, which provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

The People concede the point. We accept the concession and will so modify the judgment. (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420 [the proper procedure for disposing of a term banned by section 654 is to impose and stay sentence].)

Second, defendant contends that, because he was in custody from January 16, 2008, to January 18, 2008, again on March 2, 2008, and again from March 5, 2008 to December 19, 2008, the trial court erred in failing to award him 294 days of actual custody credit and 146 days of conduct credit, for a total of 440 days of credit applied to his sentence imposed for the felony convictions.

Defendant did not raise this issue at the time of sentencing, and thus may be deemed to have forfeited the issue. (*People v. Scott* (1994) 9 Cal.4th 331, 351; see *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.) But where, as here, "there are other appellate issues to be decided, the appellate court may simply resolve the custody credits issue in the interests of economy." (*People v. Jones* (2000) 82 Cal.App.4th 485, 493.) Because we are modifying the judgment to stay execution of sentence on three misdemeanor convictions, we will, in the interests of judicial economy, further modify the judgment to reflect the appropriate amount of presentence custody credit.

After imposing two concurrent four-year terms for the felony burglaries, with a concurrent two-year term for the vehicle theft, the trial court sentenced defendant to "time served" on "all of the misdemeanors." Because the court failed to state the misdemeanor sentences of "time served" were to run concurrently or consecutively, they are deemed by law to be concurrent sentences. (§ 669; *People v. Downey* (2000) 82 Cal.App.4th 899, 914-915; see Cal. Rules of Court, rule 4.425(a)(3).)

Since defendant received concurrent sentences, section 2900.5 requires that presentence confinement time, including good-time/ work-time credits earned pursuant to section 4019, be credited to each sentence "where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted." (§ 2900.5; *People v. Bruner* (1995) 9 Cal.4th 1178, 1180; *People v. Edwards* (1981) 117 Cal.App.3d 436, 450.)

Here, the conduct charged in this case was the sole reason for defendant's presentence confinement. Consequently, he was entitled

to 294 days of actual custody credit and 146 days of conduct credit, for a total of 440 days of credit. (§ 4019; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.)

DISPOSITION

The judgment is modified to stay execution of defendant's sentence on counts two, three, and seven pursuant to section 654 and is further modified to specify that defendant is entitled to the following credit against the sentence imposed for his felony convictions: 294 days of actual custody credit and 146 days of conduct credit, for a total of 440 days of credit. As modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect these modifications and to further reflect that the sentence imposed on count one is the principal term (not a consecutive full term), the term imposed on count four is four years (not two years), and the terms on counts four and eight are concurrent terms (not "consecutive 1/3 non-violent" terms). The court is also directed to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

SCOTLAND, P. J.

We concur:

SIMS, J.

ROBIE, J.